

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DEWEY COBB

Claimant

VS.

TOPEKA METROPOLITAN TRANSIT AUTHORITY

Respondent

AND

CIGNA

Insurance Carrier

AND

KANSAS WORKERS COMPENSATION FUND

Docket No. 149,301

ORDER

Respondent requests Appeals Board review of an Order on Motion For Attorney Fees entered by Special Administrative Law Judge William F. Morrissey on June 5, 1995.

APPEARANCES

Claimant appeared by his attorney, Paul D. Post of Topeka, Kansas. Respondent and its insurance carrier appeared by their attorney, Timothy G. Lutz of Overland Park, Kansas. The Kansas Workers Compensation Fund appeared not. There were no other appearances.

RECORD & STIPULATIONS

The Appeals Board reviewed the record and adopted the stipulations listed in the Award.

ISSUES

The respondent raises the following issues on appeal:

- (1) Whether the Special Administrative Law Judge erred in awarding attorney fees on behalf of the claimant and against the respondent in the total sum of one thousand one hundred eighty-one dollars and fifty cents (\$1,181.50); and

- (2) What is the liability of the Kansas Workers Compensation Fund?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, hearing arguments and considering the briefs of the parties, the Appeals Board finds as follows:

During a settlement hearing held on October 9, 1990, before Special Administrative Law Judge Christopher N. Cowger, the claimant settled his workers compensation claim against the respondent for injuries suffered on December 11, 1989. All issues between the Kansas Workers Compensation Fund and the respondent were reserved for future determination. The settlement included payment of prior medical bills with future medical bills being the claimant's responsibility. Claimant was not represented by an attorney at the settlement hearing.

The claimant was treated for his work-related injuries by Dr. Ronald J. Zoeller, a chiropractic physician, in Topeka, Kansas. This medical treatment was authorized by the respondent. There is no indication from a review of the settlement hearing testimony or review of the work sheet for settlement prepared by the respondent attached thereto, that any of the medical expenses incurred for the treatment of claimant's injuries would not be paid in full.

Prior to the respondent's settling this case with the claimant, a controversy had already risen concerning whether all Dr. Zoeller's chiropractic treatment for claimant's injuries was reasonable and necessary. The respondent employed Thomas R. Rhudy, D.C., to provide a utilization review of Dr. Zoeller's treatment of claimant's injuries. Dr. Rhudy's reports dated June 8, 1990 and March 19, 1992, contained his opinion as to whether Dr. Zoeller's treatment of claimant was reasonable and necessary. Dr. Rhudy recommended that only one thousand two hundred forty-eight dollars (\$1,248.00) of the two thousand seven hundred thirty-five dollars (\$2,735.00) statement of Dr. Zoeller be paid as reasonable and necessary. Respondent's insurance carrier paid this amount to Dr. Zoeller. However, Dr. Zoeller was not satisfied with this payment and filed a lawsuit against the claimant for payment of services rendered in the additional amount of one thousand five hundred thirty-seven dollars (\$1,537.00).

Thereafter, claimant employed Mr. Paul D. Post, attorney at law, to represent him in the lawsuit. Mr. Post was able to have the case transferred from the District Court to the Director of Workers Compensation for a determination of whether the care rendered by Dr. Zoeller was reasonable and necessary.

Administrative Law Judge Floyd V. Palmer, in an Order dated April 15, 1992, after considering evidence before him in reference to Dr. Zoeller's care and treatment of the claimant, found such treatment to be reasonable and necessary and ordered respondent to pay the balance of Dr. Zoeller's statement in the amount of one thousand four hundred eighty-seven dollars (\$1,487.00). From that Order, the respondent requested review by the Director of Workers Compensation, who modified the Administrative Law Judge's Order finding that the respondent liable to pay Dr. Zoeller one thousand two hundred forty-eight dollars (\$1,248.00) as recommended by Dr. Rhudy and the balance of the charges were found to be unnecessary and unreasonable treatment.

Following the Director's Order, Dr. Zoeller, again, filed a lawsuit against the claimant requesting payment for services rendered in the amount of one thousand five hundred thirty-seven dollars (\$1,537.00). Mr. Post, claimant's attorney, defended the lawsuit and ultimately obtained a dismissal of the lawsuit on May 6, 1994, with Dr. Zoeller agreeing to pay attorney fees in the amount of two hundred fifty dollars (\$250.00).

This matter now comes before the Appeals Board from an Order on Motion For Attorney Fees entered by Special Administrative Law Judge William F. Morrissey that ordered the respondent to pay attorney fees to the claimant in the amount of one thousand one hundred eighty-one dollars and fifty cents (\$1,181.50). The claimant made the attorney fee request pursuant to K.S.A. 44-536(g) which provides as follows:

"In the event any attorney renders services to an employee or the employee's dependents, subsequent to the ultimate disposition of the initial and original claim, and in connection with an application for review and modification, a hearing for additional medical benefits, or otherwise, such attorney shall be entitled to reasonable attorney fees for such services, in addition to attorney fees received or which the attorney is entitled to receive by contract in connection with the original claim, and such attorney fees shall be awarded by the director on the basis of the reasonable and customary charges in the locality for such services and not on a contingent fee basis. If the services rendered under this subsection by an attorney result in an additional award of compensation, the attorney fees shall be paid from such amounts of compensation. If such services involve no additional award of compensation, the director shall fix the proper amount of such attorney's fees in accordance with this subsection and such fees shall be paid by the employer or the workers compensation fund, if the fund is liable for the compensation pursuant to K.S.A. 44-567 and amendments thereto, to the extent of the liability of the fund."

The claimant asked for attorney fees for services his attorney was required to perform in representing him during proceedings before the District Court of Shawnee County, Kansas and before the Division of Workers Compensation in regard to Dr. Zoeller's statement for treatment of claimant's injuries. Claimant argues that K.S.A. 44-536(g) requires reasonable attorney fees to be ordered paid for services performed subsequent to the ultimate disposition of the initial and original claim. Claimant contends that the settlement of this case with the respondent disposed of his claim and any subsequent need for services rendered by an attorney is required to be paid by the respondent. On the other hand, respondent argues that the claimant's request for attorney fees should be denied as respondent had no control over Dr. Zoeller that would prevent him from filing a collection lawsuit against the claimant in District Court. Respondent further contends that K.S.A. 44-536(g) only is applicable where the claimant is in need of services of an attorney to make a proper application for additional compensation benefits. Respondent asserts the statute does not apply to this situation where the services of an attorney were required to defend the claimant against a collection lawsuit in District Court. Respondent did not argue that the amount requested for attorney fees was unreasonable which included a request for five hundred ten dollars (\$510.00) for services performed on appeal before the Appeals Board.

In the claimant's Motion for Attorneys Fees, attorney fees were requested in the total sum of two thousand thirty-six dollars and fifty cents (\$2,036.50), which included services in the amount of \$255.00 to present his claim before the Special Administrative Law Judge. The Special Administrative Law Judge awarded attorney fees in the amount of one thousand one hundred eighty-one dollars and fifty cents (\$1,181.50), which included services performed for the claimant between October 10, 1991 through March 19, 1992 and two hundred fifty-five dollars (\$255.00) for services to present his claim before the Special Administrative Law Judge. The Special Administrative Law Judge denied claimant's request for attorney fees in the additional amount of eight hundred fifty-five dollars (\$855.00) reasoning that this request was for services provided in the District Court defending against the frivolous lawsuit filed on April 28, 1993. The Special Administrative Law Judge found the claimant had received attorney fees in this case and the respondent had no duty to defend the frivolous lawsuit.

The Appeals Board finds that claimant was required to employ an attorney subsequent to the settlement of his claim with the respondent to represent him because respondent had not paid in full the authorized medical for treatment of claimant's injuries. Accordingly, as required by K.S.A. 44-536(g), claimant's attorney is entitled to reasonable attorney fees for such services he provided the claimant. However, the Appeals Board concludes that the Special Administrative Law Judge and the Appeals Board only have authority to award attorney fees against the respondent for services performed before the Division of Workers Compensation and not before the District Court of the State of Kansas. Accordingly, the Appeals Board finds that the claimant should be awarded attorney fees for services performed before the Division of Workers Compensation from October 10, 1991 through March 19, 1992 in the amount of \$480.25; \$255.00 for services performed before the Special Administrative Law Judge on his Motion for Attorney Fees and \$510.00 for services performed on appeal before the Appeals Board, for a total amount of \$1,245.25.

(2) The Appeals Board affirms the Special Administrative Law Judge's finding that there is no evidence to indicate whether any portion of the liability for this attorney fee claim should be assessed against the Kansas Workers Compensation Fund.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order on Motion for Attorney Fees entered by Special Administrative Law Judge William F. Morrissey, dated June 5, 1995, is hereby modified and an award is entered as follows:

AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Dewey J. Cobb and against the respondent, Topeka Metropolitan Transit Authority, and its insurance carrier, CIGNA, for attorney fees in the sum of \$1,245.25.

Fees necessary to defray the expenses of administration of the Kansas Workers Compensation Act are hereby assessed to the respondent to be paid direct as follows:

William F. Morrissey Special Administrative Law Judge	\$150.00
Appino & Biggs Reporting Service Transcript of Motion Hearing	\$143.60

IT IS SO ORDERED.

Dated this ____ day of November 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: Paul D. Post, Topeka, Kansas
Timothy G. Lutz, Overland Park, Kansas
Bob Storey, Topeka, Kansas
William F. Morrissey, Special Administrative Law Judge
Philip S. Harness, Director